

Charges--Four Basic StepsPRIVATE To Charging What You Can Prove

When an employee challenges an adverse action before a third party, the single most important issue in determining the outcome is the agency's ability to prove the facts it gave as a reason for action in the notice of proposal. Many, many actions are overturned, not because the agency failed to prove there was a reason for disciplinary action, but rather because the agency failed to prove the specific reason it gave. If your actions are to stand, it is critical that you take time for careful, objective analysis before you ever begin to draft the proposal notice. This is a systematic approach that may work for you.

1. Evaluate the evidence you have

What kind of evidence do you have? Some kinds of evidence are given more weight by third parties than others. What does the evidence prove? Where are the holes? Do you have the employee's explanation? How would you attack the evidence if you were the employee's representative? Is there additional evidence you can readily get that will make a difference? Try to get to the bottom of any conflicting accounts. Where it's simply one person's word against another's, evaluate their relative credibility.

2. Develop alternative charges

Stick to plain language that fits the evidence. As case law now stands, it is wise to avoid terms with specific meanings in criminal law, like "assault" or "theft," unless your legal staff are confident they can prove all the criminal law elements. Try to think of all the plausible approaches that fit the evidence. For instance, a person who has (allegedly) shot 15 people may be unavailable for duty because he's in jail. As long as management disapproves leave, AWOL is a very plausible approach that fits your evidence! If the type of behavior that forms the basis for your action is specifically discussed in the agency standards of conduct, in the disciplinary policy, or in a negotiated agreement, you will want to be aware of the language and policy approach and consider a charge that cites the policy. However, don't use a charge from any policy document if it doesn't fit your facts.

3. Look at current, relevant case law

Once you have some optional approaches in mind, consult your references and look at a few cases with similar fact patterns. Some charges you are considering may carry specific burdens of proof that have been defined in case law from the courts or the Board. You need to show that your action meets those burdens or write a statement of reasons that avoids them. For instance, if you are considering a charge of "insubordination," review the case law and your evidence and determine whether you can prove intent. Could the employee's failure to perform the duties in question have been negligence rather than willful disobedience? Might the employee be able to prove mental or emotional problems that explain the failure? If the duties are important to management, you can show that an action for failure to perform them promotes the efficiency of the service without taking on the "intent" burden inherent in the "insubordination" charge. You will, however, want to be sure you are not attempting to penalize an employee for performance that actually meets the established performance standards for the position.

In the example given of the employee who is in jail, using the alleged criminal activity as your charge will raise some very specific burdens, and the independent activity of the court system may affect the agency's ability to meet them. The AWOL charge, on the other hand, raises much lower burdens if the agency can show it is not applying its attendance policy to the employee in a disparate way.

4. Refine the charges, in clear language that distinguishes charges from specifications.

Your letter of proposal should tell the employee clearly what charge is going to be proved, for instance: "Disorderly conduct." If this statement contains more than one element, for instance: "Disorderly, threatening conduct," you must prove each element or your charge will fail. However, you can provide information that describes the relevant incidents, explains their impact, or gives any other details you think are relevant to your reasons for action, without making that information part of the charge and raising higher burdens of proof for your action. This supporting information is sometimes called "specifications" in the case law.

Distinguish the specifications from the charge by putting them in a separate sentence or paragraph with language such as: "The agency bases this charge on the following information..." The specific incidents, allegations, etc. that support the charge may then be described in enough detail to tell the employee what you are talking about and/or why the agency considers the behavior serious. If a third party finds you have proved some specifications and not others, the charge as a whole can still be sustained.

It is unwise to use terms associated with specific burdens of proof, like "threat," "assault," or "hostile environment" in your supporting information, since an adjudicator may find you have changed the nature of your charge and raised your burden of proof. It is also unwise to throw in an undifferentiated profusion of facts and allegations that forces a reader to interpret what will be proved. If the charge is open to interpretation, the employee's representative has an opportunity to fashion an interpretation that is favorable to the employee and unfavorable to the agency. Administrative judges have also been known to interpret and/or summarize confusing or inartful reasons for action in ways that affected the agency burden of proof. If the agency representative feels an administrative judge has mischaracterized the charge, it is essential that the agency place an objection on the record, thereby preserving the opportunity to seek review by the full Board of any adverse decision that may result from the mischaracterization.

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